No. 17-646

In the
Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR *AMICI CURIAE* CRIMINAL DEFENSE EXPERTS IN SUPPORT OF PETITIONER

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Amici Curiae

September 11, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
STATEMENT OF INTEREST 1
SUMMARY OF ARGUMENT 1
ARGUMENT 4
I. Eliminating The Separate-Sovereigns Exception Will Not Impede, But Will Enhance, The Orderly Administration Of Criminal Justice In Our Federal System 4
II. Eliminating The Separate-Sovereigns Exception Will Facilitate Plea Bargaining 12
III. Upon Elimination Of The Separate-Sovereigns Exception, The Double Jeopardy Clause Should Apply To Both The Federal Government And The States 16
CONCLUSION 21
APPENDIX

TABLE OF AUTHORITIES

Cases

Abbate v. United States,
359 U.S. 187 (1959) 4, 18

Bartkus v. Illinois,
359 U.S. 121 (1959) 10

Blockburger v. United States,
284 U.S. 299 (1932) 2, 6

Brady v. United States,
397 U.S. 742 (1970) 12

Brown v. Ohio,
432 U.S. 161 (1977) 6, 9, 16, 17

Cohens v. Virginia,
19 U.S. (6 Wheat.) 264 (1821) 18

Commonwealth v. Cepulonis,
373 N.E.2d 1136 (Mass. 1978) 5

Green v. United States,
355 U.S. 184 (1957) 18

Ideal Mut. Ins. Co. v. Winker,
319 N.W.2d 289 (Iowa 1982) 15

Kibler v. State,
227 S.E.2d 199 (S.C. 1976) 15

Moore v. Illinois,
55 U.S. 13 (1852) 18

People v. Daiboch,
191 N.E. 859 (N.Y. 1934) 15

People v. Dipre,
70 N.Y.S.3d 823 (N.Y. Sup. Ct. 2018) 6

People v. Halim,
223 Cal. Rptr. 3d 491 (Cal. Ct. App. 2017) 6, 7

Puerto Rico v. Sánchez Valle,
136 S. Ct. 1863 (2016) 17, 18

Saenz v. Roe,
526 U.S. 489 (1999) 19

Santobello v. New York,
404 U.S. 257 (1971) 12

State v. Hogg,
385 A.2d 844 (N.H. 1978) 5

State v. Salisbury,
147 P.3d 108 (Idaho Ct. App. 2006) 15

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 19

United States
v. All Assets of G.P.S. Auto. Corp.,
66 F.3d 483 (2d Cir. 1995) 11, 19

United States v. Dixon,
509 U.S. 688 (1993) 6

United States v. Dorman,
496 F.2d 438 (4th Cir. 1974) 15

United States v. Figueroa-Soto,
938 F.2d 1015 (9th Cir. 1991) 11

United States v. Frederick,
702 F. Supp. 2d 32 (E.D.N.Y. 2009) 13

United States v. Gonzales,
834 F.3d 1206 (11th Cir. 2016) 7

United States v. Long,
852 F.2d 975 (7th Cir. 1988) 15

United States v. Lucas,
841 F.3d 796 (9th Cir. 2016) 11

United States v. Oppenheimer,
242 U.S. 85 (1916) 19

United States v. Taylor,
777 F.3d 434 (7th Cir. 2015) 8

United States v. Zone,
403 F.3d 1101 (9th Cir. 2005) 10

Yates v. United States,
135 S. Ct. 1074 (2015) 9

Statutes

11 Del. Code Ann. tit. 11, §209 5

18 Pa. Cons. Stat. and Cons. Stat. Ann. §111 5

18 U.S.C. §371 8

18 U.S.C. §1347 8

18 U.S.C. §1349 8

18 U.S.C. §1470 8

18 U.S.C. §2422 8

720 Ill. Comp. Stat. 5/3-4 5

Ark. Code Ann. §5-1-114 5

Cal. Penal Code §793 5

Ga. Code Ann. §16-1-8 5

Haw. Rev. Stat. §701-112 5

Idaho Code Ann. §19-315 5

Ind. Code Ann. §35-41-4-5 5

Ky. Rev. Stat. Ann. §505.050 5

Minn. Stat. Ann. §609.045 5

Miss. Code Ann. §99-11-27 5

Mont. Code Ann. §46-11-504 5

N.D. Cent. Code Ann. §29-03-13 5

N.J. Rev. Stat. §2C:1-11 5
N.Y. Crim. Proc. §40.20.2 5
Nev. Rev. Stat. Ann. §171.070 5
Okla. Stat. Ann. tit. 22, §130 5
Okla. Stat. Ann. tit. 22, §131 5
Utah Code Ann. §76-1-404 5
Va. Code Ann. §19.2-294 5
Wash. Rev. Code Ann. §10.43.040 5
Wis. Stat. Ann. §939.71 5

Rules

Fed. R. Crim. P. 16 19
Fed. R. Evid. 801 13
Fed. R. Evid. 803 15

Other Authorities

Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1 (1992) 18

Hon. William H. Rehnquist, *1993 Year-End Report on the Federal Judiciary*, 17 Am. J. Trial Advoc. 571 (1994) 9

J.L. Brierly, The Law of Nations (5th ed. 1955) 18

Julie Rose O'Sullivan, *The Federal Criminal Leviathan*, 37 Harv. J.L. & Pub. Pol'y 57 (2014) 9

Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. Legal Analysis 737 (2009) 13

STATEMENT OF INTEREST[1]

Amici are criminal defense practitioners with years of experience defending individuals in federal and state criminal prosecutions, and criminal law professors with years of experience examining the criminal justice system. Given their frequent interactions with prosecutors and forums across multiple sovereigns and their study of criminal justice, *amici* are uniquely positioned to explain how discarding the so-called "separate-sovereigns" exception to the Double Jeopardy Clause will enhance the criminal justice system by providing appropriate incentives to both prosecutors and defendants, while encouraging Congress to identify unique federal elements that justify criminalizing conduct at the national level. The resulting improvements to the criminal justice system will inure to the benefit of all parties to that system—prosecutors, defendants, defense counsel, lawmakers, and courts alike—and, in turn, to the public at large.

A full list of *amici* is set forth in the appendix to this brief.

SUMMARY OF ARGUMENT

Elimination of the judicially created "separate-sovereigns" exception to the Double Jeopardy Clause not only makes sense as a matter of doctrine but also

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

would properly align incentives for prosecutors, defendants, and lawmakers on the local, state, and federal levels. In fact, nearly half of the states already prohibit prosecutions based on conduct previously prosecuted in federal court. Those state-law prohibitions have not created any undue obstacles to efficient criminal law enforcement.

Even without the judge-made separate-sovereigns exception, prosecutors for the second-in-time sovereign—whether federal or state—would remain capable of bringing a second prosecution so long as the offenses were, in fact, different. Under the test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932), and its progeny, two offenses are sufficiently different for purposes of the Double Jeopardy Clause provided each contains an element that the other does not. That inquiry allows successive prosecutions for different offenses and incentivizes sovereigns to focus their criminal prohibitions on conduct that implicates their distinct concerns in our federal system. In particular, employing *Blockburger* rather than the separate-sovereigns exception incentivizes Congress to consider whether there is truly a distinct federal interest that justifies enacting a separate federal criminal offense and thus deters the overfederalization of criminal law and avoids wasted resources in the re-prosecution of crimes already prosecuted at the state and local levels.

Eliminating the separate-sovereigns exception would also facilitate plea bargaining, a practice that this Court has recognized enhances the administration of criminal justice. At present, the separate-sovereigns exception deters plea bargaining

because a guilty plea in a first-in-time prosecution can be used as near-conclusive evidence of guilt in a second-in-time prosecution by another sovereign. As a result, cases that could be efficiently resolved by a guilty plea needlessly consume significant resources of prosecutors, defense counsel, and the courts. Eliminating the separate-sovereigns exception will remove that artificial impediment to plea bargaining.

Finally, eliminating the separate-sovereigns exception should produce the same result whether the second-in-time prosecution is brought by the federal government or a state government. In our federal system, there is no reason for individuals to be subject to double jeopardy based on the identity of the second-in-time sovereign. The evolution and application of this Court's incorporation doctrine is one of the intervening legal developments that justifies reconsideration of the separate-sovereigns exception. And that same incorporation doctrine requires that the Double Jeopardy Clause must apply equally to the federal government and state governments. That result only makes sense in our federal system. Indeed, ensuring that both the federal and state governments are bound by a liberty-preserving provision like the Double Jeopardy Clause is critical to ensuring that the promise of the Framers that being subjected to two sovereigns would enhance, not reduce, liberty is fully realized.

ARGUMENT

I. Eliminating The Separate-Sovereigns Exception Will Not Impede, But Will Enhance, The Orderly Administration Of Criminal Justice In Our Federal System.

The separate-sovereigns exception has been justified on the basis of the supposed "undesirable consequences" that would follow if prosecution by one sovereign barred prosecution of the same offense by another sovereign. *Abbate v. United States*, 359 U.S. 187, 195 (1959); *see* U.S. Br. in Opp. to Cert. 7. Specifically, the United States has argued here that, "if a federal prosecution could bar [subsequent] prosecution by a State, the result would be a significant interference with the States' historical police powers." U.S. Br. 7. And if a state undertook the first prosecution, the United States contends, "'federal law enforcement must necessarily be hindered.'" *Id.* (quoting *Abbate*, 359 U.S. at 195).

These concerns are vastly overstated. As an initial matter, almost half of the states *already* bar a state prosecution based on conduct that has previously been prosecuted in federal court. Frequently these prohibitions are a matter of state statutory law; for example, California law provides that "[w]hen an act charged as a public offense is within the jurisdiction of the United States, or of another state or territory of the United States, as well as of this state, a conviction or acquittal thereof in that other jurisdiction is a bar to the prosecution or indictment in this state." Cal.

Penal Code §793.[2] In other states, comparable prohibitions are enshrined in the state constitution. *See, e.g.*, *State v. Hogg*, 385 A.2d 844, 847 (N.H. 1978) (holding that subsequent state prosecution following federal-court acquittal for the same crime is unconstitutional under state Double Jeopardy Clause). But in either case, the profusion of these proscriptions dramatically undercuts the contention that eliminating the separate-sovereigns exception would result in "significant interference with the States' historical police powers," or that the exception is necessary to the orderly administration of criminal justice.

More fundamentally, the absence of the separate-sovereigns exception would not mean that the federal government or state governments will be left without means to vindicate their distinct sovereign interests when prosecuting crimes. Any concerns that overruling the separate-sovereigns exception would leave the criminal law of a second-in-time sovereign unvindicated are better addressed by this Court's longstanding *Blockburger* doctrine, articulated in

---

[2] *Accord* Ark. Code Ann. §5-1-114; 11 Del. Code Ann. tit. 11, §209; Ga. Code Ann. §16-1-8; Haw. Rev. Stat. §701-112; Idaho Code Ann. §19-315; 720 Ill. Comp. Stat. 5/3-4(c); Ind. Code Ann. §35-41-4-5; Ky. Rev. Stat. Ann. §505.050; Minn. Stat. Ann. §609.045; Miss. Code Ann. §99-11-27; Mont. Code Ann. §46-11-504; Nev. Rev. Stat. Ann. §171.070; N.J. Rev. Stat. §2C:1-11; N.Y. Crim. Proc. §40.20.2; N.D. Cent. Code Ann. §29-03-13; Okla. Stat. Ann. tit. 22, §§130-131; 18 Pa. Cons. Stat. and Cons. Stat. Ann. §111; Utah Code Ann. §76-1-404; Va. Code Ann. §19.2-294; Wash. Rev. Code Ann. §10.43.040; Wis. Stat. Ann. §939.71; *see also Commonwealth v. Cepulonis*, 373 N.E.2d 1136, 1141 (Mass. 1978) (generally adopting "same evidence" test to decide when a prior federal prosecution will bar a subsequent state prosecution).

Blockburger v. United States, 284 U.S. 299 (1932), and its progeny.

The *Blockburger* doctrine sets forth the "established test for determining whether two offenses" arising from the same act or transaction "are sufficiently distinguishable to permit" a prosecution for the second offense following a prosecution for the first offense notwithstanding the Double Jeopardy Clause. *Brown v. Ohio*, 432 U.S. 161, 166 (1977). Under *Blockburger*, two criminal offenses are not the "same offense" for double jeopardy purposes if each offense "requires proof of a fact which the other does not." 284 U.S. at 304. This test "emphasizes the elements of the two crimes," *Brown*, 432 U.S. at 166, and indeed has been described as the "same-elements test," *United States v. Dixon*, 509 U.S. 688, 696 (1993). In short, if "each offense contains an element not contained in the other," they are different offenses for purposes of the Double Jeopardy Clause. *Dixon*, 509 U.S. at 696.

Because of the separate-sovereigns exception, the *Blockburger* test has typically been applied only within a single sovereign—*i.e.*, to determine whether a single sovereign (a state or the federal government) may prosecute a second offense following its own prosecution of a first offense. At least in federal court,[3] there has yet been no occasion to apply the

---

[3] A number of states that already prohibit subsequent prosecutions for the same offense across sovereigns have employed a *Blockburger*-like test to permit a subsequent state prosecution when the state and federal crimes are not the "same offense." *See, e.g.*, *People v. Dipre*, 70 N.Y.S.3d 823 (N.Y. Sup. Ct. 2018); *People v. Halim*, 223 Cal. Rptr. 3d 491 (Cal. Ct. App. 2017).

Blockburger test across two sovereigns—*i.e.*, to determine whether one sovereign may prosecute a second offense following a prosecution of a first offense by a different sovereign—because the separate-sovereigns exception has categorically removed that circumstance from the purview of the Double Jeopardy Clause. But there is no principled reason why, if the separate-sovereigns exception is eliminated, the *Blockburger* test would not apply across sovereigns in determining whether the offense a second sovereign seeks to prosecute is the "same offense" as the offense in the earlier prosecution.

As a result, abolishing the artificial separate-sovereigns exception—found nowhere in the plain text of the Fifth Amendment—will not categorically spell the end of a second-in-time sovereign's ability to vindicate its distinct sovereign interests. Rather, the second-in-time sovereign will be able to pursue its prosecution so long as it is not prosecuting the "same offense," *i.e.*, if the two offenses differ under *Blockburger*'s "same-elements" test. For example, if a human trafficker brings individuals into the country under false circumstances, *Blockburger* allows the federal government to prosecute visa fraud while state authorities prosecute sex trafficking offenses. *See, e.g.*, *Halim*, 223 Cal. Rptr. 3d at 499-501 (holding that federal visa fraud and state sex trafficking are different offenses under *Blockburger*). Similarly, in the case of health care fraud, a state may be able to prosecute state criminal health care fraud charges while federal prosecutors pursue charges of making a false statement to the United States. *Cf., e.g.*, *United States v. Gonzales*, 834 F.3d 1206, 1219-20 (11th Cir. 2016) (holding that federal conspiracy to commit

health care fraud, 18 U.S.C. §§1347, 1349, and conspiracy to defraud the United States, 18 U.S.C. §371, are different offenses under *Blockburger*). And someone transferring obscene materials to a minor to induce them into a sexual act could face federal charges for the transfer of materials and state charges for the enticement. *Cf., e.g., United States v. Taylor*, 777 F.3d 434, 438-40 (7th Cir. 2015) (holding that federal prohibition on transfer of obscene materials to a minor, 18 U.S.C. §1470, and federal prohibition on enticement, 18 U.S.C. §2422(b), are different offenses under *Blockburger*). In short, each sovereign will continue to be able to prosecute different crimes in a manner that protects its respective sovereign interests.

Although applying *Blockburger* across sovereigns will still allow subsequent prosecutions when the sovereigns pursue distinct crimes, *Blockburger* and the separate-sovereigns doctrine are not co-extensive. When the federal government criminalizes conduct not to address some distinct federal interest but to be seen as "doing something" to address a perceived problem that has long been the province of state law enforcement, *Blockburger* will not save a subsequent duplicative prosecution that merely rehashes what a prior prosecution has already litigated. But that is a feature, not a bug. Eliminating the separate-sovereigns doctrine and refocusing attention on *Blockburger* will have the salutary benefit of incentivizing sovereigns to avoid duplicative criminal prosecutions and to draft criminal laws that faithfully reflect their distinct sovereign interests, if any. Because the *Blockburger* inquiry looks to the statutory elements of each offense, reliance on *Blockburger* will

require a second-in-time prosecutor to find a criminal offense that criminalizes conduct unique to that sovereign. A sovereign's legislature will know that if it simply rehashes the same elements of another sovereign's criminal offense, or merely repeats those elements while adding a single new element, the Double Jeopardy Clause will appropriately prohibit successive prosecutions. *Cf. Brown*, 432 U.S. at 167 (greater-included offense is "the 'same' for purposes of double jeopardy" as lesser-included offense). That, in turn, will incentivize the legislature to refocus on whether there is really a need for criminalization at that level of government.

Accordingly, eliminating the separate-sovereigns exception and permitting *Blockburger* to apply across sovereigns will likely result in fewer, but clearer, more finely tuned criminal laws, benefiting all parties to the criminal justice system—prosecutors, defendants, defense counsel, and courts. It will have an especially constructive impact at the federal level, in light of the almost universally recognized trend toward "overcriminalization" in federal law. *Yates v. United States*, 135 S. Ct. 1074, 1100 (2015) (Kagan, J., dissenting); *see also, e.g.*, Julie Rose O'Sullivan, *The Federal Criminal Leviathan*, 37 Harv. J.L. & Pub. Pol'y 57, 57 (2014) (noting that there are at least "4,000 criminal statutes, but no one actually knows how many criminal prohibitions exist, in part because Congress regularly delegates to federal agencies the authority to promulgate regulations implementing legislation"); Hon. William H. Rehnquist, *1993 Year-End Report on the Federal Judiciary*, 17 Am. J. Trial Advoc. 571, 575 (1994) (urging Congress to reconsider continuing to "sweep[] many newly created crimes,

such as those involving juveniles and handgun murders, into a federal court system which is ill-equipped to deal with those problems and will increasingly lack the resources in this era of austerity"); Pet'r Br. 42-46. Applying the more focused *Blockburger* inquiry, rather than the free pass of the separate-sovereigns exception, would give Congress an incentive to refocus on whether there is a distinctly federal interest justifying proposed criminal laws, and to avoid scoring political points by simply enacting federal laws that rehash state-level offenses, lard up the U.S. Code, and needlessly divert the resources of the federal criminal justice system.

Finally, eliminating the separate-sovereigns exception makes practical sense given the healthy cooperation between state and federal law enforcement. The federal and state governments have long worked "in cooperation" with each other to address and prosecute crimes in a single jurisdiction. *Bartkus v. Illinois*, 359 U.S. 121, 123 (1959). For example, "[t]o promote cooperation and information-sharing," state and federal officials frequently established task forces whose participants include assistant U.S. Attorneys, state deputy district attorneys, federal agents, and local police department investigators. *United States v. Zone*, 403 F.3d 1101, 1103 (9th Cir. 2005) (per curiam). In cases where federal and state sovereigns both claim jurisdiction, that task force may help "make a strategic decision where to prosecute it." *See id.* Federal and state authorities may also practice "cross-designation," which is "the practice of swearing in a state law enforcement officer as a special deputy United States marshal to assist in joint state/federal task forces," or

"administering a similar oath to federal officers assisting in state prosecutions." *United States v. Lucas*, 841 F.3d 796, 801 n.4 (9th Cir. 2016); *see also, e.g.*, *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 495 (2d Cir. 1995) (discussing "the cross-designation of a state district attorney as a federal official to assist or even to conduct a federal prosecution"). In still other cases, authorities from one sovereign may share entire files with authorities from another sovereign, and they may even sit alongside each other "at the prosecution table" during trial in a single jurisdiction. *United States v. Figueroa-Soto*, 938 F.2d 1015, 1017 (9th Cir. 1991).

This federal-state cooperation demonstrates that when the "same offense" is prohibited by both state and federal law, coordination between jurisdictions can ensure that the offense is prosecuted once and for all in the proper jurisdiction. Similarly, when one or the other jurisdiction prohibits a different offense under *Blockburger*, state and federal prosecutors will have strong incentives to cooperate and coordinate in ways that reflect the distinct sovereign interests of our national and state governments. Accordingly, the separate-sovereigns exception is largely unnecessary—separate sovereigns can and do cooperate to prosecute a single sovereign's crime—and its elimination will hardly upend the administration of criminal justice. Rather, eliminating the exception will force lawmakers to refocus on each sovereign's distinct interests and promote further federal-state cooperation, which "undoubtedly fosters effective enforcement of the criminal law" and "is surely to be encouraged." *All Assets of G.P.S. Auto. Corp.*, 66 F.3d at 499.

II. Eliminating The Separate-Sovereigns Exception Will Facilitate Plea Bargaining.

Abrogating the separate-sovereigns exception will facilitate the resolution of cases through guilty pleas, rather than full-blown and resource-intensive trials. This Court has recognized that plea bargaining "is an essential component of the administration of justice" that "is to be encouraged." *Santobello v. New York*, 404 U.S. 257, 260 (1971). The potential benefits from efficient plea bargaining are legion: It "leads to prompt and largely final disposition of most criminal cases," "avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial," "protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release," and, "by shortening the time between charge and disposition, ... enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned." *Id.* at 261 (citing *Brady v. United States*, 397 U.S. 742, 751-52 (1970)). And from a practical perspective, efficient plea bargaining is not only desirable but necessary: "If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Id.* at 260. Yet the separate-sovereigns exception currently disincentivizes guilty pleas.[4]

---

[4] None of this is to suggest that excessive reliance on plea bargaining does not have its costs. There are many situations in which the plea bargaining dynamic gives prosecutors undue leverage and even the innocent have little practical alternative but to accept a plea. *See generally* Oren Bar-Gill & Omri Ben-

For criminal offenses that could give rise to culpability under both federal and state law, the current separate-sovereigns exception places defense counsel in an untenable position during plea bargaining. If a defendant pleads guilty in one proceeding, that defendant's admission of guilt may later be used against him in a second-in-time proceeding by a different sovereign for the same offense. Courts have "uniformly found that evidence of a defendant's valid prior state-court guilty plea for similar or lesser included conduct is properly admissible in a subsequent federal prosecution, even where admission of the plea could be considered virtually 'tantamount to directing a verdict.'" *United States v. Frederick*, 702 F. Supp. 2d 32, 37 (E.D.N.Y. 2009); *see also id.* (collecting cases and holding that where "there is no allegation of any constitutional defect with the state court plea, there are no grounds for excluding a prior state court plea" in a subsequent federal court prosecution); *see also* Fed. R. Evid. 801(d)(2) (providing that opposing party's statement is not hearsay).

Defense counsel thus may be understandably reluctant to recommend that their clients plead guilty to an offense in one proceeding if that guilty plea may then be used against a client in a subsequent prosecution. For obvious reasons, defense counsel will

---

Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. Legal Analysis 737 (2009). But whatever other measures are appropriate to make plea bargaining fairer and more efficient, it makes little sense to have a judge-made doctrine like the separate-sovereigns doctrine serve as an impediment to efficient plea bargaining in a whole class of cases.

not want to encourage their clients to plead guilty if doing so will hand a second-in-time prosecutor near-conclusive evidence (*i.e.*, a virtually insurmountable admission of guilt for the same offense in open court) for use in a subsequent prosecution.[5]

To be sure, first-in-time defense counsel can try to negotiate an agreement with a potential second-in-time prosecutor precluding the prosecutor from using the defendant's guilty plea or accompanying allocution in any subsequent trial. But that is not always—or even frequently—possible. If no charges have yet been filed in the potential second jurisdiction, there may be no prosecutor with whom defense counsel can negotiate. This problem is particularly pervasive in cases where there are multiple potential venues for a subsequent prosecution. Furthermore, even if first-in-time defense counsel is able to identify and contact the potential second-in-time prosecutor, defense counsel may not be licensed to practice in that second jurisdiction, and may thus be unable to negotiate or enter into a binding agreement with the prosecutor. And, of course, the second-in-time prosecutor may simply not agree to foreclose introduction of a prior guilty plea at a subsequent trial, especially when the subsequent investigation is in its nascent stages. *See*

---

[5] The plea bargaining dynamic underscores the superiority of the *Blockburger* framework over the separate-sovereigns exception. When the elements of the federal and state offenses are materially different, the plea to the first offense still leaves prosecutors in the second jurisdiction with distinct elements to prove. But since the separate-sovereigns exception allows a second prosecution even when the elements are identical, it creates a dynamic where the plea to the first offense leaves the defendant with no defense to the follow-on prosecution.

United States v. Long, 852 F.2d 975, 979 (7th Cir. 1988).

Pleas of *nolo contendere* (or "no contest"), rather than guilty pleas, may provide some protection in second-in-time proceedings. *See* Fed. R. Evid. 803(22). But some states do not authorize such pleas,[6] and they may be strongly disfavored in practice even when technically permitted. *See, e.g., United States v. Dorman*, 496 F.2d 438 (4th Cir. 1974) (upholding district court's refusal to accept defendant's *nolo contendere* plea based on judge's "general rule" not to consent to such pleas). In all events, while in a subset of cases there may be creative ways of surmounting the difficulties that the separate-sovereigns exception presents for defense counsel advising a client on a guilty plea, there are other cases where the obstacles are insurmountable, and there is no valid reason for inflicting the costs of creative workarounds in the others. Eliminating the separate-sovereigns exception would remove all these obstacles and facilitate efficient plea bargaining in the many cases where the criminal offenses of multiple jurisdictions are potentially applicable.

---

[6] *See, e.g., State v. Salisbury*, 147 P.3d 108, 112 (Idaho Ct. App. 2006) ("[T]here is no ... Idaho statute or rule that provides for *nolo contendere* pleas."); *Ideal Mut. Ins. Co. v. Winker*, 319 N.W.2d 289, 291 (Iowa 1982) (noting that "we do not have the plea of *nolo contendere*"); *People v. Daiboch*, 191 N.E. 859, 860 (N.Y. 1934) ("The plea of 'non vult' or 'nolo contendere' is an ancient plea in criminal cases still in use in some of the states but abolished here."); *Kibler v. State*, 227 S.E.2d 199, 201 (S.C. 1976) ("[T]he proper procedure for our lower courts to follow is to refrain from accepting pleas of Nolo contendere in felony cases until such are authorized by our legislature.").

III. Upon Elimination Of The Separate-Sovereigns Exception, The Double Jeopardy Clause Should Apply To Both The Federal Government And The States.

As reflected in the arguments set forth above, the elimination of the separate-sovereigns exception should produce the same result whether the second-in-time prosecution is brought by the federal government (as in this case) or a state government. No matter which sovereign comes second, the Double Jeopardy Clause bars prosecution of the "same offence" prosecuted in the first proceeding.[7] That much plainly follows from incorporation doctrine. Insofar as the evolution of incorporation doctrine is one of the reasons for reconsideration of the separate-sovereigns exception in the first place, *see* Pet'r Br. 35-42, it would be particularly bizarre not to apply the Double Jeopardy Clause (stripped of the judicially created separate-sovereigns exception) only in federal court. Thus, whether the first prosecution was state or federal and whether the follow-on prosecution is state or federal, the second-in-time prosecutors should not be able to pursue charges for the "same offence."

The underlying purpose of the Double Jeopardy Clause reinforces this conclusion. Just as "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units," *Brown*, 432 U.S.

---

[7] As this Court has made clear, moreover, the Clause bars a second prosecution for the same offense whether the first prosecution resulted in an acquittal or a conviction. *Brown*, 432 U.S. at 165.

at 169, the Clause cannot be evaded by mere strategic timing and location of first-in-time prosecutions. Irrespective of the initial forum, the Double Jeopardy Clause is intended to "shield individuals from the harassment of multiple prosecutions for the same misconduct." *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring). Unless the Double Jeopardy Clause is to be treated as a pleading obstacle, rather than a fundamental guarantee of liberty, the protections afforded by the Clause must apply whether the second-in-time prosecution is brought by the federal government or by a state.

The fundamental unfairness of duplicative prosecutions prohibited by the Double Jeopardy Clause does not depend on the order of the prosecutions. At bottom, the Double Jeopardy Clause is motivated by a concern for the *individual*. The individual's interest in securing finality as to an accusation of criminal conduct is plainly just as apparent in state-first and federal-first prosecutions:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957). It is an equal "affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense." *Abbate*, 359 U.S. at 203 (Black, J., dissenting).[8]

To provide that much-needed finality, irrespective of whether the federal or state prosecution proceeds first, "a final judgment in a criminal case, just as a final judgment in a civil case, should preclude renewal of the fray anyplace in the Nation." *Sánchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring) (citations omitted). Finality in the criminal context is, after all, even more important than finality in the civil realm. *See United States v. Oppenheimer*, 242 U.S. 85, 87-88

---

[8] *Accord, e.g.*, *Moore v. Illinois*, 55 U.S. 13, 21-22 (1852) (McClean, J., dissenting) ("[T]he criminal laws of the Federal and State Governments emanate from different sovereignties; but they operate upon the same people, and should have the same end in view ... no government, regulated by laws, punishes twice criminally the same act."); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1, 9 (1992) ("The cases that articulate and apply the dual sovereignty doctrine misrepresent a basic, structural features of American government. Their [erroneous] lesson, put simply, is that politics, not people, possess sovereign power in this country."); *id.* at 26 ("The people of the United States constitute the only sovereign power recognized under the nation's law."); see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 347 (1821) ("The people of the United States are the sole sovereign authority of this country."). *See also, e.g.*, J.L. Brierly, The Law of Nations 150 (5th ed. 1955) ("sovereignty" is a "much-abused word").

(1916) (noting that "[i]t cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt"). And conditioning finality on a prior state-court prosecution has serious implications for criminal practice—for example, it frustrates state courts' abilities require the defense to opt into reciprocal discovery. *See* Fed. R. Crim. P. 16(b) (imposing parallel discovery on the defense when the defense requests discovery from the prosecution). Given the large-scale information sharing between authorities, a defendant might be deprived of the ability to forgo revealing a defense before a potential trial in the second-in-time forum.

There is no practical need to make the Double Jeopardy Clause a one-way ratchet, since all of the benefits of federal and state cooperation run both ways. As Judge Calabresi has explained, the considerable frequency of federal-state prosecutorial cooperation "should cause one to wonder whether it makes much sense to maintain the fiction that federal and state governments are so separate in their interests that the dual sovereignty doctrine is universally needed to protect one from the other." *All Assets of G.P.S. Auto. Corp.*, 66 F.3d at 499.

This Court has embraced Justice Kennedy's observation that the "genius" of the Framers was to recognize that subjecting the People to two sovereigns, rather than one, would enhance liberty. *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). The Framers' insight was genius precisely because it runs counter to the

intuition that doubling the number of sovereigns would double the sources of tyranny. The vast bulk of this Court's jurisprudence is faithful to and indeed facilitates the Framers' vision. But the judge-made separate-sovereigns doctrine stands out like the proverbial sore thumb. Allowing a second sovereign to pursue separate criminal charges out of a single incident without any regard to whether the two prosecutions involve the "same offence" is the very embodiment of the intuition that two sovereigns pose a greater threat to liberty than just one. The Court should take this opportunity to vindicate the Framers' liberty-enhancing vision and discard a doctrine that licenses two sovereigns to put an individual's liberty in jeopardy twice for the same offense.

CONCLUSION

For the foregoing reasons, this Court should overrule the separate-sovereigns exception to the Double Jeopardy Clause and reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Amici Curiae

September 11, 2018

APPENDIX

APPENDIX OF AMICI CURIAE[1]

Norman Abrams, UCLA School of Law

Lawrence Alexander, University of San Diego School of Law

Howard W. Anderson III,[2] Pendleton, SC

Jensie L. Anderson, University of Utah S.J. Quinney College of Law

Peter L. Arenella, UCLA School of Law

Robert Aronson, University of Washington School of Law

Ronald J. Bacigal, University of Richmond School of Law

Christopher L. Blakesley, UNLV Boyd School of Law

Robert Blecker, New York Law School

John H. Blume, Cornell Law School

Anthony J. Bocchino, Temple University Beasley School of Law

Richard J. Bonnie, University of Virginia School of Law

Ronald J. Bretz, Western Michigan University Cooley Law School

A. Bates Butler III, Tucson, AZ (former United States Attorney)

---

[1] The views expressed in the brief are not necessarily the views of any clients of the signatories.

[2] Counsel of record in *Gordillo-Escandón v. United States*, No. 17-7177 (U.S.).

Robert Calhoun, Golden Gate University

Helen Y. Chang, Golden Gate University

Dane S. Ciolino, Loyola University New Orleans College of Law

Kendall Coffey, Miami, FL (former United States Attorney)

Michael Louis Corrado, University of North Carolina School of Law

Randall T. Coyne, University of Oklahoma College of Law

William B. Cummings, Alexandria, VA (former United States Attorney)

Joshua Dressler, Ohio State University Moritz College of Law

William V. Dunlap, Quinnipiac University

Barry Friedman, New York University School of Law

Leon Friedman, Hofstra University Maurice A. Deane School of Law

Alfredo Garcia, St. Thomas University School of Law

Norman M. Garland, Southwestern Law School

Bennett L. Gershman, Pace University Elisabeth Haub School of Law

Lissa Griffin, Pace University Elisabeth Haub School of Law

Joseph D. Harbaugh, Nova Southeastern University Shepard Broad College of Law

Janet Hoeffel, Tulane University Law School

Michael H. Hoffheimer, University of Mississippi School of Law

Scott Howe, Chapman University Dale E. Fowler School of Law

Donald M. Jones, University of Miami School of Law

Nathaniel R. Jones, Cincinnati, OH (former United States Circuit Judge)

Peter Keane, Golden Gate University School of Law

Lundy R. Langston, Florida A&M University College of Law

Stephen G. Larson, Los Angeles, CA (former United States District Judge)

Fredric I. Lederer, William & Mary Law School

Torrence Lewis, Pittsburgh, PA

John C. Lifland, New York, NY (former United States District Judge)

Arnold H. Loewy, Texas Tech University School of Law

Paul Marcus, William & Mary Law School

A. Melvin McDonald, Phoenix, AZ (former United States Attorney)

Patrick McLaughlin, Los Angeles, CA (former Assistant United States Attorney)

Michael Meltsner, Northeastern University School of Law

Daniel J. Morrissey, Gonzaga University School of Law

Frederick C. Moss, Southern Methodist University Dedman School of Law

Patrick K. O'Toole, San Diego, CA (former Assistant United States Attorney)

Richard Parker, Harvard Law School

Michael Perlin, New York Law School

Jeffrey Jude Pokorak, Suffolk University Law School

Sidney Powell, Dallas, TX (former Assistant United States Attorney)

William Bradford Reynolds, Washington, DC (former Assistant Attorney General)

Ira P. Robbins, American University Washington College of Law

James A. Rolfe, Dallas, TX (former Assistant United States Attorney)

Amy D. Ronner, St. Thomas University School of Law

Kevin V. Ryan, San Francisco, CA (former United States Attorney)

Bradley J. Schlozman, Wichita, KS (former United States Attorney)

Maimon Schwarzschild, University of San Diego School of Law

Abraham D. Sofaer, Stanford Law School (former United States District Judge)

Leonard N. Sosnov, Widener University Delaware Law School

Joseph Thai, University of Oklahoma College of Law

David Thomas, Chicago-Kent College of Law

Sandra G. Thompson, University of Houston Law Center

Michael E. Tigar, American University Washington College of Law

Michael Tonry, University of Minnesota Law School

Mary Pat Treuthart, Gonzaga University School of Law

Rodney J. Uphoff, University of Missouri School of Law

James Etienne Viator, Loyola University New Orleans College of Law